No. 91-5118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DERRICK MORGAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Do the Fourteenth and Sixth Amendment rights to a fair and impartial jury require voir dire questioning concerning potential bias in favor of the death penalty in every state court prosecution for a capital offense.

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OPINION BELOW

Certiorari was granted to review the decision of the Illinois Supreme Court in *People v. Morgan*, 142 Ill. 2d 410, 568 N.E.2d 755 (Ill. 1991). A copy of that opinion may be found within the parties' joint appendix at pages 125-185.

STATEMENT OF THE CASE

Petitioner, Derrick Morgan, was indicted along with two others (Lockridge and Evans) by the Cook County Grand Jury for murder: the shooting death of David "Swift"

Smith. The Petitioner was found guilty of the charge by a jury (Tr. 1217), and a jury found him eligible for the death penalty (Ill. Rev. Stat. ch. 38, §9-1(b)(5)), and then sentenced Petitioner to death. (Tr. 1477) Judgment was entered on the verdict. (Tr. 1736)

Briefly, the evidence showed Petitioner admitted to having been paid by a "big dope dealer" $2,000 before, and $2,000 after, he and two other El Rukns (gang members) murdered a man called "Swift." Petitioner admitted to a witness (Stephen Benjamin) that he placed a bag of flour in an abandoned apartment on Calumet Avenue, and then lured "Swift" to that apartment, telling "Swift" that he had cocaine for them to pick up. (Tr. 717)

Once there, with Lockridge and Evans nearby, Petitioner allowed "Swift" to taste the flour, and as "Swift" was tasting it, shot him in the head five or six times. (Tr. 718)

Benjamin also testified that Petitioner told him he was planning to break out of the LaPorte County (Indiana) jail on a trip to the dentist's office, by killing the guards and then go back to Chicago and "take care of all of the witnesses." (Tr. 719)

On December 17, 1985, police officers found David "Swift" Smith lying in a pool of blood, a clear plastic bag containing a white powder near his body. Police officers noticed several gunshot wounds to "Swift's" head. Lashone Joyner, the live-in girlfriend of David "Swift" Smith, described "Swift" as being "good friends" with the Petitioner. (Tr. 663) Both Petitioner and the victim appear to be of the same race. (Tr. 301)

The jury was selected on July 6 and July 7, 1988. (Tr. 183, 432) Three separate venires were brought to the courtroom before the jury was chosen. The trial judge advised each venire that, if chosen as jurors, each juror

"must follow" the law. (J.A. 23, Tr. 207, 448, 522-23) The first of such instructions was:

> [TRIAL JUDGE]: . . . After you have heard the evidence in court and testimony of the witnesses, then I will present to you propositions of law that you must follow in reaching your verdict in this case.
>
> Now, the fact the defendant was indicted is only a means by which he is brought to trial. Under the law the defendant is presumed to be innocent of the charge against him, and this remains throughout the trial of the case and is only overcome after you have heard all the evidence, and closing arguments of the counsel, and been advised on the law by the Court, and you have been retired to the jury room, and after you have all unamiously [sic] agreed, then your decision will make a determination.
>
> The Judge is the judge of the law, which means I will decide what law is to be presented in this case. . . . (J.A. 23)[1]

The trial judge also advised each venire that, if chosen as jurors, each venire person would first deliberate on guilt or innocence, and if a guilty finding, then on eligibility for the death penalty, and finally on the death penalty. (J.A. 23, Tr. 207, 437, 523) The trial judge emphasized

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[1] The trial judge then told the second venire: ". . . [A]fter you have heard all of the evidence and the witnesses, and you have heard the Court admonishing you with reference to the law that you must use in reaching your verdict, these instructions on the law will be instructed to you as jurors to be taken into the jury room, when you have an absolute duty and obligation to follow the instructions that the Court gives you." (Tr. 448)

The trial judge told the third venire: ". . . I would like to go into some of the basic principles of law that will be involved in this case, . . . that will be given to the jury ultimately when the case has been completed. . . . they will be given to the jury and must be used in their deliberation in reaching a verdict in this case." (Tr. 522, 523)

that further "final instructions are given after a completion of the proceedings." (J.A. 23, Tr. 522-23)

The jurors who decided the case were: Alfred Kleoss (J.A. 29), Mary Morrow (J.A. 35), Helen Zeber (J.A. 39), Ethelinda Thomas (J.A. 45), Rosanne Wurster (J.A. 50), Betty Ritchie (J.A. 57), Yolanda Farinella (J.A. 61), Robert Hinchley (J.A. 66), Wanda Davis (J.A. 73), Mark Armgardt (J.A. 83), Stuart Ship (J.A. 94), and Ronald Zubkoff (J.A. 102).

Nine of the twelve were directly asked, "Would you follow my instructions on the law, even though you may not agree with them?" (J.A. 30, 38, 43, 49, 56, 60, 64, 69, 107) All nine agreed that they would. Juror Mark Armgardt (J.A. 83) said he could be "fair and impartial," and that his answers would be "substantially the same" as other jurors. (J.A. 84, 88) Juror Wanda Davis (J.A. 73) was not asked about following the law though the question was repeated by the trial judge throughout the day. (Tr. 222, 235-36, 256, 269-70, 271, 282, 292, 294, 313, 318, 333, 343, 347, 363, 369, 374, 385, 391, 396, 399, 417) Juror Stuart Ship (J.A. 94) was also not asked about following the law. However, he was questioned almost immediately after the trial judge informed the third venire panel that they must use the instructions on the law in their deliberations. (Tr. 522-23)

After seven venire members had been questioned, including three who eventually became jurors—Kleoss (J.A. 29); Morrow (J.A. 35); Zeber (J.A. 39)—Petitioner's counsel first requested the trial judge to ask prospective jurors: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" (J.A. 44) Petitioner did not raise the issue earlier, even though there were two opportunities for Petitioner's counsel to suggest questions for use on voir dire. (Tr. 190, 219-27)

The trial judge's voir dire process uncovered several venire members with bias (Tr. 423, 350, 377, 382—bias against handguns); (Tr. 339—bias against "lawlessness"); (Tr. 359—persons who could "not give the defendant a fair trial.") Venire member Benjamin Dexter was asked if he could give the defendant a fair trial. He answered:

> I would have no problem during the trial. If it came . . . I had a friend's parents murdered twelve years ago before capital punishment. I would give a fair trial. If he is found guilty, I would want him hung. [sic]

Mr. Dexter was excused for cause. (J.A. 72-73)

When venire member Stuart Ship was asked if he would automatically vote against the death penalty no matter what the facts of the case were, he answered: "I would not vote against it." (J.A. 97-98) Although Petitioner's counsel challenged Mr. Ship for cause, the basis for the challenge was not that Mr. Ship was automatically for the death penalty. Rather, counsel challenged Mr. Ship because Mr. Ship initially stated that, if Petitioner did *not* testify, Mr. Ship would wonder "why." (J.A. 98, 100-101) The trial court judge denied Petitioner's challenge for cause. (J.A. 101) Since the trial judge and Petitioner's counsel believed that Petitioner had exhausted his peremptory challenges, Mr. Ship was seated as a juror. (J.A. 102, Tr. 430, 505-506)[2]

After the jury found Petitioner guilty of murder, and just before hearing the evidence of eligibility, the trial judge again advised the jurors that their task was to

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[2] Petitioner may have only exhausted nine peremptory challenges. (Lynch: Tr. 258; Wells, Disabato, Petersen: Tr. 310; Grzesiak, Mekhitarian: Tr. 330; Jambor, Bamberg: Tr. 428; Farina: Tr. 505) Thus, Petitioner actually may have had one more peremptory challenge available.

determine whether Petitioner was eligible for the death penalty. (Tr. 1216, 1238, 1658) At the conclusion of the eligibility evidence, the trial judge instructed the jurors that they could only find Petitioner death eligible if they found unanimously and beyond a reasonable doubt the existence of a statutory aggravating factor. (J.A. 112) At the conclusion of the evidence in aggravation and mitigation, the trial judge instructed the jurors that, while deliberating on the sentence, they should consider all the aggravating and mitigating factors supported by the evidence. (J.A. 122)

The jury sentenced Petitioner to death. (Tr. 1477, 1682)

The Illinois Supreme Court affirmed the conviction and the death penalty. About the issue before this Court, the Illinois Supreme Court said:

> The defendant also contends that he was denied an impartial jury when the trial court refused to ask potential jurors if they would automatically impose the death penalty if they found the defendant guilty. During jury selection, the defendant requested that the trial court ask prospective jurors: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" The trial court denied this request.
>
> This Court has already held that "there is no 'reverse-*Witherspoon*' rule that requires the trial court to 'life qualify' a jury to exclude all jurors who believe that the death penalty should be imposed in every murder case." (*Brisbon*, 106 Ill. 2d at 359). Further, the defendant has not demonstrated, or even suggested, that any of the actual jurors on his jury were biased towards the death penalty. *People v. Caballero* (1984), 102 Ill. 2d 23, 46.
>
> * * *

(J.A. 172-73). Petitioner now asks this Court to rule that the trial judge committed constitutional error when he

refused to ask whether prospective jurors would automatically vote to impose the death penalty no matter what the facts of the case were.

SUMMARY OF ARGUMENT

Although the Fourteenth and Sixth Amendments to the United States Constitution provide rights to a fair and impartial jury, criminal defendants in state court prosecutions do not have a constitutional right in every case to interrogate potential jurors about a bias in favor of the death penalty. General fairness questions, questions concerning the venireman's ability to find the facts and to follow the law, *Witherspoon* questioning, and the juror's oath will usually be sufficient to detect bias. If a particular juror's responses to those questions suggest an area of actual bias, or if there is a substantial indication of the likelihood of prejudice in the individual case, then additional questioning or even a challenge for cause may be appropriate. However, the Constitution does not impose a code of trial procedure on the state courts. This Court should reaffirm the right of the sovereign states and their trial judges to devise their own voir dire procedures and to control voir dire proceedings in state courtrooms.

Petitioner has not identified any special circumstance to justify a new rule of law in his case. Petitioner's case does not involve an interracial murder. Nor should this Court indulge Petitioner's belief that there is a significant number of persons automatically for the death penalty. Petitioner's studies were not introduced in the trial court, and are not properly part of the record before this Court. These studies are not matters of "general knowledge" and should be stricken.

This Court should conclude that after *Gregg v. Georgia*, 428 U.S. 153 (1976), the discretion of the capital sentencer has been confined to constitutionally acceptable limits, and now there is little opportunity for the sentencer to give vent to personal prejudices in a capital case.

Because this Court's decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) did not confer a "benefit" on the State, Petitioner is not entitled on equitable grounds to a "reverse-*Witherspoon*" procedure. The *Witherspoon* decision only implemented the constitutional rights to a fair and impartial jury, and Petitioner has received the full measure of every right afforded him by the Constitution.

ARGUMENT

I.

THE SIXTH AND FOURTEENTH AMENDMENTS SHOULD NOT INCLUDE A SPECIFIC REQUIREMENT THAT STATE COURT JUDGES QUESTION JURORS ON WHETHER THEY WOULD ALWAYS RETURN A DEATH PENALTY VERDICT UPON FINDING A DEFENDANT GUILTY OF MURDER.

The Fourteenth Amendment's guarantee of due process of law, and the Sixth Amendment's guarantee of a fair and impartial jury, should not be interpreted as including a specific obligation on the part of the state trial judges to question prospective jurors on whether they would automatically vote for the death penalty upon finding a defendant guilty of murder.

Relying on *Witherspoon v. Illinois*, 391 U.S. 510 (1968), Petitioner urges this Court to require specific voir dire questions, directed at each prospective juror in state death

penalty proceedings, to determine whether the juror automatically would vote to impose the death penalty upon a finding of guilt. Respondent argues that the subject of voir dire is best left within the discretion of the trial judge, and that specific voir dire responsibilities are not, and should not be, required by the Constitution. Such a requirement would be an awkward intrusion into the role of state trial judges.

Obviously, no biased person should ever sit upon a jury, and any sign of bias should be followed by questions from the trial judge to detect and remove any juror who is prejudiced or who could not follow the law. *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988). But that is not our situation here. Rather, Petitioner asks this Court to constitutionally mandate the automatically for the death penalty question for every prospective juror regardless of the circumstances of the case or the personal circumstances of the prospective juror.

This Court has been reluctant to engraft a particular voir dire formula on the Sixth and Fourteenth Amendments. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (plurality opinion); *Ristaino v. Ross*, 424 U.S. 589 (1976); *Ham v. South Carolina*, 410 U.S. 524 (1973). In *Turner v. Murray*, 476 U.S. 28 (1986) and *Mu'Min v. Virginia*, 111 S. Ct. 1899 (1991), this Court did not consider death penalty litigation to be a sufficiently compelling circumstance to justify imposing a code of voir dire procedure on the states. The Fourteenth Amendment requires due process of law in state court jury selection procedures. *Ham*, 409 U.S. at 526. To be constitutionally compelled, however, it is not enough that specific voir dire questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair. *Mu'Min*, 111 S. Ct. at 1905.

A. The danger of persons automatically for the death penalty remaining undetected throughout voir dire is not sufficiently real to require the automatically for the death penalty question as a matter of constitutional law.

This Court's voir dire cases state that specific inquiry upon a subject must be made, as part of the Sixth and Fourteenth Amendment guarantees, only if there is a "sufficiently real" presence of an attitude or feeling which would keep the prospective juror from being fair. As stated in *Mu'Min*:

> [T]wo parallel themes emerge from both sets of cases:[3] first, the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is *sufficiently real* that the Fourteenth Amendment requires that inquiry be made into racial prejudice; second, the trial court retains great latitude in deciding what questions should be asked on voir dire.

111 S. Ct. at 1904 [emphasis added].

The only "sufficiently real" possibility of juror bias recognized by this Court is racial prejudice in the context of an interracial capital case. In *Turner*, 476 U.S. at 37, this Court held that a question concerning racial prejudice would be constitutionally required only when there was the conjunction of three factors: the crime charged involved interracial violence, broad discretion was given the jury at the death penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case.

[3] The Court was comparing its supervisory authority over voir dire in cases tried in federal courts, *Connors v. United States*, 158 U.S. 408 (1895), *Aldridge v. United States*, 283 U.S. 308 (1931), and *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), with its authority over voir dire in cases tried in state courts where the Court's authority is limited to enforcing the Constitution. *Ham v. South Carolina*, 409 U.S. 524 (1973); *Ristaino v. Ross*, 424 U.S. 589 (1976); *Turner v. Murray*, 476 U.S. 28 (1986).

Cf. Aldridge v. United States, 283 U.S. 308 (1931) (where, in the exercise of its supervisory authority over federal prosecutions, this Court also approved voir dire concerning racial prejudice for an African American defendant accused of an interracial, capital murder); *Ristaino*, 424 U.S. at 597 (construing *Ham* where petitioner Ham should have been allowed to ask questions concerning prejudice because "[r]acial issues . . . were inextricably bound up with the conduct of the trial").

Petitioner asserts that there is a sufficiently real danger that a juror automatically for the death penalty will remain undetected throughout voir dire and will be put on a jury. Petitioner persists in his position even though a venire member, Benjamin Dexter, who said that he would want to see a guilty defendant[4] "hung," [sic] was detected with a general fairness question, (J.A. 72) and excused from jury service. There was also a venire member automatically for the death penalty in *Mu'Min* who was screened out by a general fairness question. 111 S.Ct. at 1903. Petitioner erroneously insists that Stuart Ship, one of the jurors in this case, was automatically for the death penalty. When asked if he automatically would vote against the death penalty no matter what the facts of the case, Mr. Ship answered: "I would not vote against it." (J.A. 98) Although Petitioner now insists that Mr. Ship's response is clear evidence that he was automatically for the death penalty, Petitioner's objection to Mr. Ship at trial was based exclusively on Mr. Ship's statement that he would consider Petitioner's failure to testify. (J.A. 101)

[4] Dexter's words are ambiguous. Dexter may have been saying that he would want to see the person who murdered a friend's parents hanged. (J.A. 72)

B. Petitioner's studies are not part of the record, and should be stricken. Even if permitted, such studies are seriously flawed.

Petitioner and Amicus National Association of Criminal Defense Lawyers [hereinafter "NACDL"] now seek to employ four studies[5] which were not before the trial court, not considered by the Illinois Supreme Court, and are not properly part of the record before this Court. These studies should not be considered. *Ciucci v. Illinois*, 356 U.S. 571, 572-73 (1958). Respondent was unable to investigate the studies, cross-examine the authors, or bring forth other contrary studies in rebuttal. To consider these studies would be unfair to Respondent. These studies are not matters of "general knowledge", *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and should be stricken from the record.

Even if the studies are considered, the studies are seriously flawed, and have no persuasiveness. None of the

[5] Michael Nietzel, Ronald Dillehay, and Melissa Himelein, *Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 BEHAV. SCIENCE AND THE LAW 467, 473 (1987) [hereinafter "Nietzel"] (25.8% of those jurors studied were categorized as automatically for the death penalty jurors).

Michael Neises and Ronald Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared*, 5 BEHAV. SCIENCE AND THE LAW 479, 485 (1987) [hereinafter "Neises"] (24.1% of registered voters interviewed were automatically for the death penalty jurors).

Marla Sandys and Ronald Dillehay, *Juror Qualification Under The New Wainwright v. Witt Standard: A Test of Jurors' Ability to Anticipate Their Role* p. 7 (April, 1987) (unpublished manuscript reproduced in the Exhibits of Amicus NACDL) [hereinafter "Sandys"] (28.6% of those surveyed were automatically for the death penalty jurors).

James Luginbuhl and Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW AND HUM. BEHAVIOR 263, 274, 276 (1988) [hereinafter "Luginbuhl"] (1% of those surveyed were automatically for the death penalty jurors).

studies directly addresses the primary issue of this case. Three of the studies do not appear to be objective given the bias and possible conflict of interest by their common author.[6] There are serious problems in the methodology of these studies, and the results are markedly inconsistent with other studies.[7]

[6] The Neitzel, Neises and Sandys Studies do not appear to be objective when the orientation of the authors is examined. Professor Ronald C. Dillehay, who was a co-author of all three studies, has actively worked as a jury consultant for the defense in capital cases. Nietzel, *supra* note 5 at 471 n.5. Dillehay's colleague, Professor Michael Nietzel, also works in the same capacity as a defense jury consultant. The Nietzel Study, with its focus on the efficacy of using jury consultants to reduce the likelihood of a death verdict, as well as its emphasis on a jury consultant's ability to maximize successful defense challenges for cause, illustrates the bias and potential conflict of interest on the part of the authors. Nietzel, *supra* note 5 at 476.

[7] Joseph Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure*, 78 J. AM. STAT. ASS'N 544, 549 (1983) [hereinafter "1983 Kadane"], citing Louis Harris, Study No. 814002 (January, 1981) (unpublished study for the NAACP Legal Defense and Education Fund, Inc.) [hereinafter "Harris Study"] (1% of those surveyed were automatically for the death penalty jurors).

Joseph Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors*, 8 L. & HUM. BEH. 115, 116 (1984) [hereinafter "1984 Kadane"] (1% of adult American population were automatically for the death penalty jurors).

Hovey v. Superior Court, 616 P.2d 1301, 1344 n.111 (Cal. 1980) (in the opinion of seven expert witnesses who testified at a hearing in the trial court, the percentage of automatically for the death penalty jurors in the population was very low).

Grigsby v. Mabry, 569 F. Supp. 1273, 1297 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226, 234-35 (8th Cir. 1985), *rev'd sub nom. Lockhart v. McCree*, 476 U.S. 162 (1986), citing George Jurow, *New Data on the Effect of a "Death-Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971) (2% of those surveyed were automatically for the death penalty jurors).

Grigsby, 758 F.2d at 234-35, citing Andrea Young, Arkansas Archival Study (1981) (unpublished study) (study of 41 transcripts of voir dire in Arkansas capital cases between 1973 and 1981) (.5% were automatically for the death penalty jurors).

Two recent cases display the type of evidentiary hearings which should have been held, if these studies were introduced in the trial court. In the proceedings reviewed in *Lockhart v. McCree*, 476 U.S. 162 (1986), and *McCleskey v. Kemp*, 481 U.S. 279 (1987), experts testified in contested evidentiary hearings about empirical studies. These studies were given close judicial scrutiny.[8]

Here, by way of contrast, one of Petitioner's studies (the Sandys Study) was not even published. This Court has refused to rely on unpublished studies. *Witherspoon v. Illinois*, 391 U.S. at 517.

Petitioner's cited studies lend little validity to Petitioner's argument because none of the studies was designed to directly measure responses to the central issue in this case: how many, if any, would automatically vote for the death penalty upon conviction in contravention of their oath and the law. There is no evidence that potential jurors—no matter what their inclination or leaning—would not obey their oaths and follow the law once in a courtroom, before a judge, faced with the serious responsibilities at hand.

The Luginbuhl and Neises Studies briefly discuss persons automatically for the death penalty, but do not focus on that issue. Luginbuhl, *supra* at 274-75, Neises, *supra*

[8] Another example is *Hovey v. Superior Court*, 616 P.2d 1301 (Cal. 1980) where the trial court conducted an extensive evidentiary hearing on the issue of whether "death qualifying" questioning during *voir dire* produces a conviction prone jury. The hearing lasted 17 days and produced a 1,200 page transcript. *Id.* at 1302. Seven expert witnesses testified, five for the defense and two for the prosecution. *Id.* In excess of 1,000 pages of exhibits—primarily sociological studies and graphs and charts—were admitted into evidence, as were several videotapes. *Id.* Unlike the *Lockhart*, *McCleskey* and *Hovey* cases, the record here is completely barren of any adversarial testing of the validity of the studies relied on by Petitioner and Amicus.

at 492-93. The focus of the cited studies is clearly different: the Nietzel Study focused on the effects of different types of voir dire (individualized, sequestered vs. open court, en masse) on the success of defense challenges for cause and on the percentage of death verdicts; the Neises Study involved the question of whether the *Wainwright v. Witt*, 469 U.S. 412 (1985) standard would exclude more jurors based on their views of the death penalty than the *Witherspoon* standard and thereby make such "death qualified" juries even more conviction prone; the Sandys Study examines the *Witt* standard and its reliability for classifying jurors based on their views on the death penalty; and the Luginbuhl Study explored the relationship between attitudes toward the death penalty and support for or rejection of aggravating and mitigating circumstances in a capital trial. Thus, since none of the cited studies dealt with the central issue of this case, these studies are at best only "marginally relevant" to the constitutionality of Petitioner's conviction. *McCree*, 476 U.S. at 169.

The methodology of these studies is flawed. This Court in *McCree* questioned the value of studies *not* involving jurors who were *under oath* in a capital case and who actually deliberated. This Court stated, "We have serious doubts about the value of these studies in predicting the behavior of actual jurors." *McCree*, 476 U.S. at 171. One commentator called this concept "felt responsibility."

> The term "felt responsibility" is aptly used to describe the state of mind of actual jurors whose decisions carry real consequences. Mock jurors may or may not share this feeling of responsibility. "Felt responsibility" is particularly important in a capital case where the consequences may be life imprisonment or death. Unfortunately, no matter how realistic are the experimental conditions—and there was an effort in this study to intensely involve the subjects—no experiment can completely simulate a real life situation.

George Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567, 596 (1971).

The Neises, Sandys and Luginbuhl Studies, which are heavily relied on by Petitioner and Amicus NACDL, have this very flaw. The Neises Study was based on 135 registered *voters* (not *jurors* as stated in Petitioner's opening brief, p. 15, n. 2) in Fayette County, Kentucky who were interviewed by telephone. The Sandys Study involved 148 individuals who had previously served on non-capital, felony juries. The Sandys Study also employed telephone interviews. The Luginbuhl Study (Study 2, which measured jurors automatically for the death penalty) questioned 317 individuals called for jury duty in Wake County, North Carolina. None of the subjects in these three studies had been under oath and deliberated in an actual capital trial.

It is highly unlikely that those surveyed in these three studies would share the "felt responsibility" of a juror in a death penalty case. A person who is asked questions on the telephone will not give the same thoughtful responses to questions about the death penalty that he or she would give if presented with the same question sitting as a real juror, with a real defendant before them.[9]

[9] As noted in *Grigsby*, 758 F.2d at 248 n.7 (dissenting opinion):

> We will not enter into a detailed analysis of the various studies relied upon by the district court and the court today. It is enough to generally observe that an empirical study, no matter how carefully conducted, simply cannot duplicate accurately the proceedings in a courtroom under which a jury is selected and sworn to try the issues in a criminal case. The responsibilities placed on jurors in such circumstances are sobering and have a solemn impact upon them. In this situation one's responsibility is felt keenly.

Thus, in accordance with this Court's view in *Lockhart*, the Neises, Sandys and Luginbuhl Studies have little value.

The one remaining study, the Nietzel Study, did examine individuals who had actually been sworn and had deliberated in 18 capital cases. However, there is another significant methodological concern with this study. The authors of this study categorized the 242 successful defense challenges for cause into five categories: automatically for the death penalty jurors, pre-formed opinion, affiliation with victim, legal principles, and other reasons. Nietzel, *supra* at 470. The authors participated in 12 of the trials as jury consultants for the defendants and reviewed transcripts of the other six trials. The authors then, based on the responses of the voir dired juror, made personal judgments and classified the defense challenges for cause to be based on automatic death penalty beliefs. *Id.* at 472.[10]

All four cited studies contain another significant methodological limitation. None of these studies is based on representative samples. Instead, these studies derived their results from extremely small groups in a limited geographic area.

In stark contrast to the samplings in these studies, the 1981 Harris Poll interviewed 1,499 people in 100 areas

[10] This study does not specify what criteria were employed by the authors in order to place a juror's response in the automatically for the death penalty category as opposed to one of the other four categories. This study also does not indicate what types of questions these jurors were asked by the respective trial judges at the time they gave their automatically for the death penalty response. Such subjective interpretation by researchers who have actively worked as jury consultants for the defense in capital cases should be given little weight by this Court. It should be noted that the 25.8% figure in the Nietzel Study is directly refuted by the Arkansas Archival Study cited in *Grigsby*, 758 F.2d at 234-35. The Arkansas Archival Study consisted of a review of forty-one transcripts of voir dires in capital cases from 1973 to 1981 which were on file at the Arkansas Supreme Court. The Arkansas Archival Study found one-half of one percent (.5%) were automatically for the death penalty jurors. *Id.*

of the country. The Harris Poll also took into consideration variables such as region, area (rural/urban), age, sex, type of work and union membership. Joseph Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure*, 78 J. AM. STAT. ASS'N 544, 549 (1983) (discussing Harris Poll).

The federal district court in *Grigsby* rejected a study prepared by Dr. Gerald Shure on automatically for the death penalty jurors similar to the four studies cited in this case. The *Grigsby* court determined that Dr. Shure's findings were not accurate since they were not based on a nationwide, representative sample:

> Dr. Shure did not maintain that his sample was representative. The West Los Angeles area included Bel Air, Beverly Hills, Venice, Brentwood and Westwood. And Dr. Shure acknowledged that area had recently had some highly publicized crimes; had few minorities; and was wealthy and conservative. The Harris study, on the other hand, did involve a carefully chosen representative national sample. The Court, while having the highest regard for Dr. Shure's sincerity, is convinced that he is "off the map" on his estimate of ADPs. [automatically for the death penalty]

Grigsby, 569 F. Supp. at 1307-1308.

This Court should similarly reject Petitioner's assessments of the four studies cited in the instant case because of their small size and their extremely limited geographic sampling.[11]

[11] In a footnote, Amicus NACDL cites the Luginbuhl Study for its finding that 10% of the sampled group would always vote for the death penalty for convicted first degree murderers. (Br. at 11 n.6). NACDL's brief appears to implicitly equate this finding with the percentage of automatically for the death penalty jurors found in the other cited studies. That brief fails to mention that the 10%

(Footnote continued on following page)

C. There can be no presumption that prospective jurors are automatically for the death penalty.

As an alternative to the statistics, Amicus NACDL has urged this Court to presume bias in favor of the death penalty as a matter of law. In all but the most extreme situations, however, this Court has refused to infer disqualifying juror prejudice. *See, e.g., United States v. Wood*, 299 U.S. 123 (1936) and *Dennis v. United States*, 339 U.S. 162 (1950) (refusing to presume bias of government employees summoned for jury duty); *Murphy v. Florida*, 421 U.S. 794 (1975) (persons exposed to pre-trial publicity); *Smith v. Phillips*, 455 U.S. 209 (1982) (juror who sought employment in the district attorney's office); and *Mu'Min*, 111 S. Ct. at 1917 (Kennedy, J., dissenting) (analyzing the very few cases tried in a "carnival atmosphere created by press coverage" where proof of individual bias was unnecessary). In fact, despite the fact that racial prejudice was the principal reason for creating the Fourteenth Amendment, *Ham*, 409 U.S. at 526-27, this Court has refused to indulge in a constitutional presumption of juror bias for or against members of any particular racial or ethnic groups. *Rosales-Lopez*, 451 U.S. at 190.

To the contrary, as this Court has stated, in a somewhat different context, that such jurors "will be few indeed as compared with those excluded because of scruples *against* capital punishment." *Adams v. Texas*, 448 U.S. 38, 49 (1980). "Despite the hypothetical existence of a

[11] *continued*

figure was derived from Study 1 in the Luginbuhl Study which did not even attempt to identify automatically for the death penalty jurors by the correct legal standard. Luginbuhl, *supra* note 5 at 271-72. The brief also fails to report the results from Study 2 in the Luginbuhl Study which the authors designed to identify automatically for the death penalty jurors. *Id.* at 272. The authors found that automatically for the death penalty jurors comprised only 1% of the total sample in their study. *Id.* at 274, 276.

juror who believes literally in the Biblical admonition 'an eye for an eye', (cites omitted), it is undeniable, . . . , that such jurors will be few indeed . . . ." *Id.*

Considering Petitioner's meager and inconclusive statistics, this Court should refuse to presume a bias for the death penalty.

D. Persons automatically for the death penalty will be detected by general fairness questions.

The trial court's explanation of the trial processes, general fairness questions, questions concerning the venireman's willingness and ability to find the facts and to follow the law, and the juror's oath are constitutionally adequate to uncover potential prejudice, including any bias in favor of the death penalty. *Turner*, 476 U.S. at 49 n.6 (Rehnquist, C.J., dissenting) (observing that general fairness questions can prompt a potential juror to admit bias); *Mu'Min*, 111 S. Ct. at 1919 (Kennedy, J., dissenting) (agreeing that an adequate number of fairness questions to which the venireman is required to respond can be adequate). Moreover, as this Court observed in *Dennis*, 339 U.S. at 171, an honest man trying to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind. Indeed, the fairness question was adequate in the instant case to facilitate a cause challenge. After venireman Benjamin Dexter was asked "Do you know any reason why you cannot give this defendant a fair trial?", Mr. Dexter expressed his feelings and was excused for cause. (Tr. 374)

A trial judge cannot be constitutionally required to voir dire potential jurors about every conceivable bias feared by the defendant. *Ristaino*, 424 U.S. at 595, 596 n.8. *See also Hamling v. United States*, 418 U.S. 87, 140 (1974) (no error to refuse questions concerning educational, political, and religious biases); *Connors v. United States*, 158 U.S. 408, 414-15 (1895) (political opinions and associations); *Ham*, 409 U.S. at 527-28 (prejudice against beards); *Rosales-Lopez*, 451 U.S. at 192-94 (ethnic bias against Mexicans or aliens); and *Mu'Min*, 111 S. Ct. at 1905 (content of news reports and pre-trial publicity). The facts of *Ham* are a particularly compelling example of why this Court should not encumber the Constitution by mandating voir dire questions concerning an issue that is in the limelight of current public opinion. The propriety of beards was a controversial issue in 1973 when *Ham* was decided. However, that issue has long since blown over. But if this Court had granted Ham's request of voir dire about beards, the Constitution would now require that venire members in 1992 be questioned concerning any bias they felt towards people with beards.

Thus, the Sixth and Fourteenth Amendments should not include a specific requirement that state court judges ask prospective jurors if they would be automatically *for* the death penalty, since there is no sufficiently real danger of persons with such a bias remaining undetected throughout the voir dire.

II.

VOIR DIRE, NOT EASILY THE SUBJECT OF APPELLATE REVIEW, SHOULD BE LEFT TO THE DISCRETION OF TRIAL JUDGES.

"Of necessity", the voir dire examination of potential jurors must be left to the sound discretion of trial judges. *Connors v. United States*, 158 U.S. 408 (1895); *Ham v. South Carolina*, 409 U.S. 524 (1973). There is no single, correct way to assure the impartiality of petit jurors. The Constitution lays down no particular test and there is no procedure "chained to any ancient and artificial formula." *Irvin v. Dowd*, 366 U.S. 717, 724-25 (1961).

Yet, as Justice White well stated in *Rosales-Lopez*, "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." 451 U.S. at 188.

As stated in *Mu'Min*, 111 S. Ct. at 1903, this Court enjoys more latitude in setting standards for voir dire in federal court under its supervisory power than it has in interpreting the provision of the Fourteenth Amendment with respect to voir dire in state courts. Appropriate respect must be given the sovereign states in the formulation of their own rules of criminal procedure. *McNabb v. United States*, 318 U.S. 332, 340 (1943). The states remain free to impose a higher standard, mandate specific jury selection procedures, or prescribe voir dire questioning about specific biases as a matter of state law. *Ristaino*, 424 U.S. at 597 n.9. *See also Cupp v. Naughten*, 414 U.S. 141, 146 (1973) and *Mu'Min*, 111 S. Ct. at 1905, 1908, in which this Court noted that practices which are "helpful" or "desirable", or which represent the "wiser course" or "better view", may not be constitutionally required.

In both the state and federal courts, regulation of voir dire traditionally has been committed to the sound discretion of the trial judge. *Rosales-Lopez*, 451 U.S. at 188-89.

Citing a number of decisions, Petitioner and Amicus ACLU assert that there exists a consensus among the state jurisdictions that a defendant has the right to ask the venire whether they would automatically impose the death penalty.[12] However, this perceived consensus can-

[12] The Illinois Supreme Court has definitively held that a trial court is not required to conduct an inquiry concerning whether

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not withstand scrutiny. Most of the 36 states that have a death penalty have not considered this issue at all. Eight courts (not two as claimed by Petitioner and Amicus) have held or suggested that this matter is best committed to the discretion of the trial judge, and that voir dire examination need not be conducted to detect venire persons automatically for the death penalty. *Henderson v. State*, 583 So. 2d 276, 283-84 (Ala. Crim. App. 1990), *aff'd*, *Ex Parte Henderson*, 583 So. 2d 305 (Ala. 1991); *Riley v. State*, 585 A.2d 719, 725-26 (Del. 1990); *Commonwealth v. Haynes*, 281 S.E.2d 209, 211-12 (S.C. 1981). *See also Irving v. State*, 498 So. 2d 305 (Miss. 1986) (strongly indicating such examination is within the trial judge's discretion); *State v. Rogers*, 341 S.E.2d 713, 722 (N.C. 1986); *overruled on other grounds*, *State v. Vandiver*, 364 S.E.2d 373 (N.C. 1988) (the trial court "is vested with broad discretion in controlling the extent and manner" of inquiry into this matter); *Timothy E. Morris v. Tennessee* (Tenn. Crim. App. September 11, 1985) (Lexis, States library, Tenn. file) (requiring that deference to the trial judge is appropriate when defense counsel seeks to "reverse-*Witherspoon*" a jury); and *King v. Strickland*, 714 F.2d 1481, 1495 (11th Cir. 1983) (denying habeas corpus relief although counsel was unable to ask whether prospective jurors would favor "a mandatory death penalty for certain crimes").[13]

[12] *continued*
the venire members are automatically for the death penalty, but that such a decision is within the discretion of the trial court. *People v. Jackson*, No. 68012 (Ill. Sup. Ct. September 26, 1991) (LEXIS, States library, Ill. file). Petitioner's contention, based on a reading of *Daley v. Hett*, 495 N.E.2d 513 (Ill. 1986), that the Illinois Supreme Court views a *Witherspoon* examination as a right vested solely with the prosecution, is based on an erroneous reading of Illinois Supreme Court's dicta. *Hett*, 495 N.E.2d at 516-17.

[13] Most of Petitioner's "consensus" cases are not on point. Most involve potential jurors who disclose a bias; all would agree these

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Furthermore, five state cases relied upon by Petitioner do not in any way support his position. In South Carolina, contrary to Petitioner's contention, neither *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990), nor *State v. Atkins*, 399 S.E.2d 760 (S.C. 1990) hold that a defendant is allowed to examine the venire for potential automatically for the death penalty jurors. In *Commonwealth v. White*, 531 A.2d 806 (Pa. 1987), a non-death penalty case, the issue was whether the trial court improperly permitted the prosecution to inform the venire about the penalty for first degree murder by asking the venire whether they had any scruples which would automatically prevent them from finding the defendant guilty, regardless of the evidence, where such a verdict would result in the maximum sentence of life imprisonment. *White*, 531 A.2d at 809. The Pennsylvania Superior Court held that the above was not error. *Id.* at 809. In *State v. McMillin*, 783 S.W.2d 82 (Mo. 1990), although the trial court refused to allow defense counsel to ask a venire member whether she would automatically vote for the death penalty, the court permitted counsel to inquire whether the venire member "could conceive of any serious case in which the death penalty might be appropriate. . . ." *Id.* at 94. The Missouri Supreme Court held that, based on the above, because the trial court permitted wide latitude for voir dire examination, the trial court's denial of the "automatically for

[13] *continued*

persons should be excused, and should not serve on a jury. *See People v. Coleman*, 759 P.2d 1260 (Cal. 1988); *Cumbo v. State*, 760 S.W.2d 251 (Tex. Cr. App. 1988); *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981); *State v. Williams*, 550 A.2d 1172 (N.J. 1988—". . . , (w)e conclude that the trial court erred in failing to excuse this prospective juror for cause").

State v. Norton, 675 P.2d 577 (Utah 1983) does appear to be a case favoring Petitioner's point of view. (*See also Pickens v. State*, 730 S.W.2d 230 (Ark. 1987)).

the death penalty question" was not an abuse of discretion. *Id.* And *Bracewell v. State*, 506 So. 2d 354 (Ala. 1986), cited by both Petitioner and Amicus ACLU, has been effectively overruled by *Henderson v. State*, 583 So. 2d 276 (Ala. Crim. App. 1990), *aff'd*, *Ex Parte Henderson*, 583 So. 2d 305 (Ala. 1991).

From the foregoing, it is eminently plain that Petitioner's and Amicus ACLU's "consensus" of support among the states is found to be wanting. This case is unlike *Aldridge*, 283 U.S. at 311-13, where this Court relied on a unanimous consensus among the states. Even a weight of authority favoring Petitioner's position does not exist.

The abuse of discretion standard is particularly appropriate because a trial judge will know the community from which the venire members have come. Thus, the trial judge will be aware of any prevailing attitudes or experiences that may make the members of his community likely to be automatically for the death penalty. To assist in making this determination, the trial judge assesses a venire member's responses, inflection and demeanor to determine his impartiality. *Patton v. Yount*, 467 U.S. 1025, 1038 & n.14 (1984); *Ristaino*, 424 U.S. at 595. Because this credibility determination is peculiarly within the trial judge's province, *Witt*, 469 U.S. at 428 and *Patton*, 467 U.S. at 1039, the conduct of voir dire should always be committed to the trial judge's discretion.

Petitioner fails to offer this Court a compelling reason to remove voir dire practice from the province of the trial judge's discretion. Even the Petitioner has not suggested that a state trial judge, sworn to uphold the Constitution of his or her State as well as the Constitution of the United States, would refuse to ask any question if there were any particular reason to believe that a given venire or venire member was not inclined to follow the law.

III.

PETITIONER'S SUGGESTION THAT HE IS ENTITLED TO ASK VENIRE MEMBERS THE INVERSE OF THE *WITHERSPOON* QUESTION IS ERRONEOUS IN LIGHT OF THE *WITHERSPOON* AND *WITT* HOLDINGS, AND IN LIGHT OF MODERN DEATH PENALTY LEGISLATION.

Pointing to the fundamental fairness guarantee of the due process clause, Petitioner finally claims he is entitled to a reciprocal benefit whenever the State has chosen "to *Witherspoon* a jury." In this connection, Petitioner specifically claims the Constitution assures him a "reverse-*Witherspoon*" procedure.

Petitioner's argument rests on a fundamental misreading of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The *Witherspoon* decision did not confer a right upon the State in jury selection in capital cases. Properly read, the *Witherspoon* decision only *limited* the State's ability to excuse for cause those jurors with "scruples" against the death penalty who could never set aside their personal views to decide a case impartially. *Witherspoon*, 391 U.S. at 522 n.21 (construed in *Adams*, 448 U.S. at 47-48).

The voir dire questioning discussed in *Witherspoon* was designed to protect both parties' right to an impartial jury by excusing those persons who could not judge the case on the evidence adduced at trial and the court's instructions. *Witherspoon*, 391 U.S. at 512. To the extent that there is a *Witherspoon* parallel, it would only come after a person said "yes" to an automatic death penalty question, and would then be asked if he or she could "follow the law." "Following the law" is the antidote to any misdirected attitudes.

There is also a quantitative difference between the *Witherspoon* question and the automatically for the death

penalty question. Illinois requires a unanimous verdict in favor of imposing death. Ill. Rev. Stat. ch. 38, §9-1(g) (1985). Thus, one person unable to impose the death penalty can act to nullify the state's law authorizing the death penalty. Persons automatically for the death penalty would not carry the same weight, however, because persons automatically for the death penalty would still need to persuade the remaining eleven jurors to vote *for* the death penalty.

Moreover, there is scant room for bias to operate during a post-*Gregg* capital sentencing hearing. Unlike the statutory scheme reviewed in *Witherspoon* which conferred unfettered discretion on the factfinder, the Illinois Death Penalty Act, extensively revised in 1977, minimizes sentencing discretion to a constitutionally acceptable level. The Illinois statute narrows the class of persons eligible for the death penalty by requiring the sentencer to find one or more statutory aggravating factors. The State may then provide additional evidence in aggravation, but the sentencer must consider all relevant mitigating evidence presented by the defendant. If a jury sits to determine sentence, that jury must unanimously conclude there are no mitigating factors sufficient to preclude imposition of the death penalty. Ill. Rev. Stat. ch. 38, §9-1 (1977); Ill. Const. Art. VI, sec. 4(b). The conditions which necessitated the *Witherspoon* decision no longer exist. *Adams*, 448 U.S. at 53 (Rehnquist, J., dissenting).

Thus, neither the Constitution, nor equity, requires that venire members in capital cases be asked "the reverse" of the *Witherspoon* question.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully prays that this Honorable Court affirm the decision and sentence of the Illinois Supreme Court.

Respectfully submitted,

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